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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

Joint Application by SBC Communications, Inc.,)

Southwestern Bell Telephone Company, and)

Southwestern Bell Communications Services, Inc.)

d/b/a Southwestern Bell Long Distance for)

Provision of In-Region, InterLATA Services in)

Kansas and Oklahoma)

CC Docket No. 00-217

**REPLY COMMENTS OF
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TABLE OF CONTENTS

SUMMARY	1
I. THE STATE RECOMMENDATIONS SHOULD BE ACCORDED LITTLE WEIGHT..	2
II. INITIAL COMMENTS CONFIRM THAT THE MINIMAL PERFORMANCE DATA PREVENTS A MEANINGFUL EVALUATION AND SHOWS LACK OF COMPLIANCE WITH THE CHECKLIST	5
III. THE RECORD SHOWS THAT SBC HAS FAILED TO DEMONSTRATE ADEQUATE PROVISIONING PERFORMANCE TO CLECS	7
IV. INITIAL COMMENTS AFFIRM THAT SBC DISCRIMINATES IN PROVISION OF OSS	8
V. SBC HAS NOT DEMONSTRATED THAT ITS UNE RATES IN OKLAHOMA AND KANSAS COMPLY WITH TELRIC	10
VI. CONCLUSION.....	14

SUMMARY

In its initial comments, Allegiance Telecom, Inc. ("Allegiance") pointed out that SBC's own performance data show a pattern of consistent discrimination against CLECs, and that there is insufficient performance data to permit a meaningful evaluation of whether SBC had adequately opened local markets to competition.

The record gathered in this proceeding amply confirms Allegiance's views. Other commenters in opposition to the application echo Allegiance's points and raise additional serious concerns, including that there is no basis on the present record for concluding that SBC has priced UNEs in accordance with TELRIC. The evaluation of the Department of Justice also affirms Allegiance's initial comments in pointing out that SBC has not provided sufficient evidence that it provides nondiscriminatory access to OSS in Oklahoma and Kansas. The recommendations of the Oklahoma and Kansas commissions should be accorded little weight because they are based in significant part on promises of future performance or are otherwise lacking in persuasive findings of compliance with the Competitive Checklist.

Accordingly, the Commission should deny this application.

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Provision of In-Region, InterLATA Services in)	
Kansas and Oklahoma)	

**REPLY COMMENTS OF
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Allegiance Telecom, Inc., ("Allegiance") submits these reply comments concerning the above-captioned Joint application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance ("SBC") for Provision of In-Region, InterLATA Services in Kansas and Oklahoma filed October 26, 2000 ("Application").¹

I. THE STATE RECOMMENDATIONS SHOULD BE ACCORDED LITTLE WEIGHT

The recommendations of the state commissions in this proceeding, particularly the Kansas Corporation Commission ("KCC"), appear to be premised in significant respects on promises by SBC of future performance. For that reason, they do not provide any basis to grant

¹ Comments Requested on the Application By SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Kansas and

the application. The KCC report is based to a significant extent on hopes that SBC will not renege on its promises to comply in the future with the Act, rather than demonstrations of current performance. Thus, the KCC states:

The Commission again stresses that its endorsement of SWBT's application is based on an expectation SWBT will fulfill the commitments it has made to this Commission and to the competitive LECs and that SWBT will cooperate with Staff in efforts to improve the performance remedy plan. The Commission anticipates that these commitments will be met and expects Staff to apprise it of any progress made addressing these concerns.²

In addition, the KCC has not completed proceedings on important issues such as the ability of competitive LECs to collocate at remote terminals.³ Allegiance submits that this completely undercuts any basis for a finding based on the KCC recommendation that SBC is complying with this Commission's collocation rules.⁴

In other areas, the KCC appears to make a finding of present compliance with a Checklist item but expresses grave doubts about whether it is correct. For example, the KCC concludes that SWBT has satisfied checklist item 2, but states it is "concerned with SWBT's performance [in the provisioning of xDSL] and will continue to monitor it closely." In addition, its conclusion that SWBT complies with checklist item 2 "relies heavily on this Commission's ability to modify the performance measures and penalties, if necessary, to assure that SWBT

Oklahoma, Public Notice, CC Docket No. 00-217, DA 00-2414, released October 26, 2000. Allegiance submitted initial comments on November 15, 2000.

² Report of the State Corporation Commission of the State of Kansas on Southwestern Bell Telephone Company's Compliance with Section 271, CC Dkt No. 00-217 (filed Nov. 20, 2000) at p. 44.

³ See *Id.* at 9.

continues to improve its performance in this area.”⁵ The KCC also instructs the staff to pay close attention to SBC’s performance measurement data to ensure compliance improves and that no backsliding occurs.”⁶

The Oklahoma Commission has submitted no more than a brief letter (together with its previous decisions) that does not rebut the initial comments and analysis in this proceeding. In particular, the Commission does not address the substantial issues raised about the lawfulness of the UNE and interconnection rates or the poor performance of SWBT on numerous performance measures.⁷

The Commission has stated that because the Act does not prescribe any standard for Commission consideration of a state commission’s verification under section 271 (d)(2)(B), “the Commission has discretion in each section 271 proceeding to determine the amount of weight to accord the state commission’s verification.”⁸ Where, as here, the Kansas Corporation Commission’s recommendation is based in part upon promises made by SWBT and where the recommendation can be viewed as “lukewarm at best” the Commission should not place

⁴ Even the Kansas Commission states that it finds that SWBT complies with checklist item one “assuming SWBT will abide by this Commission’s decision on collocation.” *Id.*

⁵ *Id.* at 21. IP Communications Comments argue that the Kansas Commission “failed to properly apply the burden of proof” with respect to DSL loops and line sharing and that the Commission relied on the Kansas staff recommendation that stated staff’s belief that there would be good performance once volumes picked up.” IP Communications at 4.

⁶ Kansas Report. at 28.

⁷ We also note that the Oklahoma Commission did not address the substantial questions raised by Cox Communications as to the procedural irregularities in the state 271 proceeding.

⁸ Memorandum Opinion and Order, Texas 271, FCC No. 00-238 (June 30, 2000), at para. 11.

substantial reliance on the state commission's analysis of whether SWBT has complied with the Competitive Checklist. Indeed, the Commission has already determined that it may not grant a Section 271 application based upon promises of future performance.⁹ As the Commission knows, RBOC financial incentives to open markets disappear once Section 271 authority has been granted.¹⁰ The Commission must insist upon an application that fully demonstrates that the local exchange market is "irreversibly" open at the time of the application.¹¹

Accordingly, the Commission should give little weight to the recommendations of the Kansas and Oklahoma commissions in evaluating SBC's application.

II. INITIAL COMMENTS CONFIRM THAT THE MINIMAL PERFORMANCE DATA PREVENTS A MEANINGFUL EVALUATION AND SHOWS LACK OF COMPLIANCE WITH THE CHECKLIST

As pointed out, the conclusions on some of the checklist items of the KCC should be accorded little weight in this proceeding. The KCC recommendation is instructive, however, in pointing out that the minimal level of competition in Kansas, and the consequent lack of performance data, makes it difficult to adequately evaluate the SBC applications. For example, the KCC states that there has been low activity in the provisioning of xDSL,¹² and that "at this

⁹ The Commission has stated many times that an applicant must show an ability at the time of the filing of the application to satisfy the various requirements of Section 271. For example in the Texas 271 proceeding the Commission stated:

the Commission has found that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. Texas 271 at para. 38; *see also* New York Order, 15 FCC Rcd at 3969.

¹⁰ In New York, grant of Section 271 authority resulted in significant backsliding.

¹¹ See DOJ Evaluation filed in Bell Atlantic New York 271, CC Dkt 99-295 at 7

¹² KCC Report at 17.

time the competitive LEC activity in Kansas [relating to the provision of xDSL services] is so limited its usefulness [in analyzing the provisioning of xDSL loops and line sharing] is unknown.”¹³ With respect to performance measures, the KCC notes that “for many of the measurements relating to interconnection, no data was reported.”¹⁴ Other measures for which there is no, or insufficient data include PM 10.2 and PM 11.2 relating to jeopardy notices, and several of the performance measures relating to 911 and E911 access. Sprint observes that SBC offers region-wide data in many instances to cover the lack of data.¹⁵ However, regionwide data is insufficient to demonstrate compliance with the Competitive Checklist in the individual states of Kansas or Oklahoma. These conclusions as to the lack of information on basic and important performance measures are completely consistent with Allegiance’s initial comments and show that the application should be denied, not granted.

Allegiance submits that, to the extent there is any doubt concerning whether the application should be promptly denied for all of the reasons raised by Allegiance and others in this proceeding, the Commission should err on the side of denial given the dirth of information in the record in many respects on which to evaluate the application.

¹³ Id. at 26. At present, there is no line sharing occurring in Kansas. Nondiscriminatory, efficient and cost-based line sharing should result in a more cost-effective and efficient provisioning of xDSL services. If SWBT were offering line sharing in a nondiscriminatory, cost efficient manner, one would expect that there would have been at least some orders for shared lines by the time of the filing of the applications.

¹⁴ Id at 8.

¹⁵ See Sprint p. 49.

¹⁶ Comments of the Department of Justice at 2.

III. THE RECORD SHOWS THAT SBC HAS FAILED TO DEMONSTRATE ADEQUATE PROVISIONING PERFORMANCE TO CLECS

The initial comments of Allegiance and others demonstrate that SBC does not provide nondiscriminatory interconnection and that its performance measurements reflect substandard and/or discriminatory wholesale services provided to CLECs in Oklahoma and Kansas.¹⁷ CLECs detail problems with both the coordinated hot-cut (CHC) process and the frame due time (FDT) process in Kansas.¹⁸ In particular, one CLEC demonstrates how SBC's CHC processes contribute to the high incidence of missed appointments and explain the seemingly high success rates of SBC's firm order confirmations (FOC).¹⁹ Upon receipt of a CLEC cut-over request, SBC will return a firm order confirmation without actually verifying whether facilities are available to perform the work later. SBC only checks the availability of facilities the day before the scheduled performance of the cut-over. In the meantime, the CLECs have relied upon the FOC to notify their customers when service is scheduled to be cut-over. The verification of facilities so late in the process inevitably leads to eleventh-hour postponements or missed appointments, resulting in frustrated customers who can be left without service when work like switch translations precedes the scheduled cut-over. Out of concern of causing harm to its customer-carrier relationship, these unreliable FOCs can compel a CLEC to "voluntarily" push-back work dates, which do not count against SBC as missed due dates and skew the performance data.

¹⁷ See, e.g., Comments of AT&T at 24-28; Comments of IP Communications Corp. at 10-28; Comments of Worldcom at 17-22; Comments of Sprint at 45-53.

¹⁸ See KMC Comments at 5-8; Allegiance Comments at 22.

¹⁹ KMC Comments at 5-8.

As detailed in Allegiance's initial comments, the performance results for loop provisioning, quality, maintenance and repair suggest that CLECs are being denied a meaningful opportunity to compete in Kansas and Oklahoma. Measurement after measurement, regardless of the loop-type, demonstrates that SBC has difficulty with firm order confirmation, causes missed work appointments, fails to provide facilities, and is otherwise providing CLECs with substandard performance.²⁰ SBC's failure to meet performance criteria should be particularly troubling in the light of the absence of an adequate level of performance data presented. Accordingly, the Commission should deny the application because SBC has not shown adequate or nondiscriminatory provisioning of essential services and facilities to CLECs.

IV. INITIAL COMMENTS AFFIRM THAT SBC DISCRIMINATES IN PROVISION OF OSS

In its initial comments, Allegiance demonstrated that over a range of OSS-related performance measures, SBC has not produced sufficient data to establish its ability to adequately process CLEC orders for UNEs.²¹ For those measures where there is sufficient data to establish a measurement of performance, SBC fails to prove that it provides nondiscriminatory access to its OSS in Kansas and Oklahoma. Instead, SBC claims essentially that because the OSS used in Oklahoma and Kansas are purportedly the same as the OSS that was approved already in Texas, the FCC should grant it the instant section 271 approval.

The Commission should reject SBC's premise that its performance in Texas warrants approval for Kansas and Oklahoma. First, as the DOJ Evaluation points out, it is unclear

²⁰ See Allegiance Comments at 7-24.

whether the OSS used in Texas, which the Commission already approved, is the same as the OSS used in Kansas and Oklahoma. Notwithstanding some undefined degree of similarity, DOJ states that SBC has failed to demonstrate that the OSS systems and processes used in Kansas and Oklahoma are the same. For instance, SBC does not offer evidence regarding the means by which it ensures that the work necessarily performed at the state level, and not at the regional level---such as the management, staffing and training of personnel involved in performing the actual provisioning, maintenance and repair of CLEC orders--will be done in the same manner as in Texas.²² “Evidence that *some* systems or processes are the same in multiple states is not sufficient to establish that *all* relevant systems and processes are the same, and evidence that a particular system is the same in many respects is not sufficient to establish that it is the same in all respects that may be relevant to a BOC’s wholesale performance.”²³ Thus, DOJ correctly concludes that SBC has not submitted sufficient evidence to prove nondiscriminatory access to the OSS relied on by CLECs in Kansas and Oklahoma and that the Commission should, at a minimum, require SBC to provide clear and detailed evidence concerning the adequacy of OSS in Kansas and Oklahoma before granting SBC’s application.

Moreover, Sprint shows that SBC’s use of manual processing of most CLEC orders is much greater in [Oklahoma and Kansas] than it was for Texas.²⁴ The high percentage of manual

²¹ Allegiance Comments at 11-13.

²² DOJ Evaluation at 32-33. DOJ notes that product offerings, ordering interface and codes, business rules, tend to differ on a state level. *Id.* at 32-34. SBC does not explain what impact on CLECs the fact that the server used to process orders for Texas is different than the one used in Kansas and Oklahoma.

²³ DOJ Evaluation at 36 (emphasis in original).

²⁴ Sprint Comments at 52.

orders for both resale and UNEs precludes reliance on the Texas data since the electronic process is much more dependable. As a state staff report indicates, it is highly unlikely that CLECs who are compelled to use manual processing methods have access to OSS that is comparable to SBC's retail operations when 85% of CLEC access is through "slow and error prone manual process."²⁵ Thus, Texas data or region-wide data does not appropriately reflect the "error-prone" outcomes likely to result from the manual processing used in Oklahoma and Kansas. Accordingly, the Commission should find on the present record that SBC has not shown that it provides nondiscriminatory access to OSS in Kansas and Oklahoma.

V. SBC HAS NOT DEMONSTRATED THAT ITS UNE RATES IN OKLAHOMA AND KANSAS COMPLY WITH TELRIC

Several initial commenters observe that SBC's recurring and nonrecurring charges for UNEs in Oklahoma and Kansas are substantially higher than those in Texas that the Commission has found to be appropriately cost-based. In addition, the recurring charges in Oklahoma typically are substantially higher than those in Kansas. As AT&T notes, virtually the same cost and other information was submitted in both Oklahoma and Kansas and there are very similar geographic factors, yet the two state commissions came up with very different recurring rates.²⁶

Although a difference in charges between two states does not definitively by itself show that one or both charges do not comply with TELRIC, a large unexplained difference raises a substantial question as to the lawfulness of the unexamined rates. As the Commission has realized, there can be variations based upon different acceptable assumptions adopted in each

²⁵ *Id.* at 52-53 (internal citation of KCC staff report omitted.)

state or upon different circumstances (*e.g.*, different wage rates)²⁷ but that large unexplained differences raise an issue of whether one or both sets of rates comply with TELRIC.

Similarly, the DOJ points out that the limited extent to which competitive carriers in Kansas and Oklahoma have availed themselves of UNEs provides further evidence that “the prices of those UNEs are not appropriately based on cost.”²⁸ TELRIC-based costs should encourage competitive entry and the limited extent of such activity is a strong indication that SBC’s UNE rates may be unlawful. The Department of Justice also states that because of the large difference between the interconnection and UNE prices in Oklahoma and Kansas compared to Texas “the Commission should undertake an independent determination whether the [prices in Oklahoma and Kansas] conform to the requirements of the 1996 Act and the Commission’s rules.”²⁹ Allegiance agrees with this view. Allegiance would go further, however, to state that in order to grant the application the Commission must make an independent determination concerning whether SBC’s UNE prices in Kansas and Oklahoma conform to the requirements of the Act and the Commission’s rules.³⁰ If the Commission is unable to make a finding that the

²⁶ AT&T Comments at 7.

²⁷ *Michigan 271 Order*, 12 FCC Rcd 20543, 20699 (1977).

²⁸ Evaluation of the Department of Justice at 2.

²⁹ *Id.* (emphasis added).

³⁰ The Commission has stated that it is its responsibility to make the final determination as to whether an applicant has satisfied the fourteen point checklist and is providing interconnection and UNEs at TELRIC prices. *Michigan 271 Order* at 20698. Although the Commission has stated that it will give deference to the states that have made a determination on the prices of UNEs and interconnection (FCC New York Order, 15 FCC Rcd 75, at para. 224 (1999)), ultimately it is the Commission that has a statutory duty to determine whether the state prices are consistent with the 1996 Act. 47 U.S.C. § 271(d)(3).

rates in Oklahoma or Kansas satisfy the 1996 Act or the Commission's rules, the Commission must reject the application.

In this connection, Allegiance submits that the Commission will be unable to make a determination that the rates are TELRIC-based because there is no cost or other information in the record that would explain why the rates are higher in Oklahoma and Kansas than in Texas. And, SBC has not presented any evidence that the differences in prices accurately reflect any underlying differences in costs.

In addition, as noted in some of the initial comments, a large number of the prices in both Oklahoma and Kansas are interim prices.³¹ For example, in Oklahoma the rates for certain UNEs and for the provisioning of collocation are not yet final. In fact, interim rates have been in place for several years. In Oklahoma the rates for xDSL loop conditioning are also interim. The KCC adopted rates arbitrated in Kansas for xDSL rates that are interim and subject to modification and true up. In Kansas there also were no final rates for provisioning of collocation as of the filing of the application. And, there is no basis for concluding that those arbitrated rates were based on TELRIC. The Commission has stated that the existence of interim rates does not, in and of itself, mandate a rejection of a Section 271 application.³² But the Commission has also

³¹ See, e.g., Comments of Sprint at 27.

³² In the New York Order the Commission stated that:

A BOC's application for in-region interLATA authority should not be rejected solely because permanent rates may not have been established for each and every element or nonrecurring cost of provisioning an element . . . If the uncertainty caused by the use of interim rates can be minimized, then it may be appropriate, at least for the time being, to approve an application based on the interim rates contained in the relevant tariff.

indicated that it fully understands the uncertainty for competitive carriers caused by the existence of interim rates and would address the existence of interim rates on a case by case basis.³³

Allegiance submits that where, as here, the extent of interim rates is significant, as in both Oklahoma and Kansas, and where it can hardly be said that the interim rates are for a “few isolated ancillary items” the Commission should find that there is not sufficient certainty to determine that the rates are TELRIC based. Therefore, the interim the rates presented in this application do not provide a basis for finding that SWBT has complied with TELRIC in either Oklahoma or Kansas.

Accordingly, in view of the inexplicably higher UNE rates in Oklahoma and Kansas and given that state decisions establishing interim rates do not apparently even purport to establish TELRIC based-rates, there is no basis in the present record for concluding that SBC’s UNE rates comply with TELRIC and the application should be denied on this ground alone. Allegiance stresses that the Commission has no obligation to extend to SBC additional opportunities to adjust rates or otherwise correct the record concerning its high UNE rates in Oklahoma and Kansas. The application was deficient on its face in demonstrating compliance with TELRIC, as well as in other respects, when submitted. The Commission should promptly deny the application.

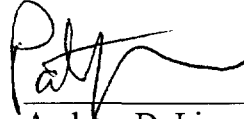
New York Order at para. 258, 15 FCC Rcd at 4090.

³³ *Id.*

VI. CONCLUSION

For the foregoing reasons, the Commission should deny SBC's Application for Section 271 authority in Oklahoma and Kansas.

Respectfully submitted,



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I, Candise M. Pharr hereby certify that the foregoing Reply Comments of Allegiance Telecom, Inc. were filed this 11th day of December, 2000 and copies of same were sent via hand delivery and/or first class mail upon the following persons on the attached list:


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